

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHANNON RICE)	
Claimant)	
VS.)	
)	Docket No. 251,413
PAYLESS CASHWAYS, INC.)	
Respondent)	
AND)	
)	
ZURICH U S)	
Insurance Carrier)	

SHANNON RICE)	
Claimant)	
VS.)	
)	Docket No. 251,414
PAYLESS CASHWAYS, INC.)	
Respondent)	
AND)	
)	
INSURANCE CO. STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Respondent and one of its insurance carriers, Zurich U S, appealed the preliminary hearing Order for Compensation dated April 5, 2000, entered by Administrative Law Judge Brad E. Avery.

ISSUES

Judge Avery ordered the respondent and its insurance carrier in Docket No. 251,413 to provide claimant with medical treatment and temporary total disability compensation. The issue on this appeal is whether claimant sustained personal injury by accident arising out of and in the course of her employment with respondent.

The claims in Docket Nos. 251,413 and 251,414 were consolidated for preliminary hearing and trial. In his April 5, 2000 order, Judge Avery determined that written claim in

Docket No. 251,414 was not timely served. That finding was not appealed and claimant did not otherwise raise the issue in her brief for purposes of this review. Therefore, the conclusion of the ALJ in Docket No. 251,414 is affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

After reviewing the record compiled to date, the Appeals Board finds the Order for Compensation should be affirmed.

(1) Claimant has a history of right shoulder problems and, as a result, had changed jobs at Payless from yard worker to the less physically demanding position of gate attendant. Thereafter, she was moved inside the store to counter sales. About a week before the incident on April 28, 1999, while she was working in counter sales, claimant asked to see a doctor because stocking shelves was bothering her shoulder. She was not sent to a physician at that time.

(2) The claimant testified that she felt sharp pain in her right shoulder on or about April 28, 1999, when she pointed out to a co-worker where nails were located. After this incident, claimant again requested medical treatment and respondent sent her that same day to Dr. Doug Frye.

(3) The date of accident alleged in Docket No. 251,413 is "on or about April 22, 1999," but claimant described the pain on April 28, 1999 as worse than what she had experienced the week before.

(4) Claimant's present need for medical treatment is directly related to the April 1999 incidents at work.

Conclusions of Law

(1) An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.²

(2) After observing claimant testify, Judge Avery found her testimony credible and found that claimant's work activities, at the very least, aggravated her right shoulder condition.

¹ Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971).

² Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

Considering claimant's testimony, the testimony of Loren Schelble, and the medical records in evidence, the Appeals Board agrees. Therefore, the Appeals Board affirms the finding that claimant sustained personal injury by accident arising out of and in the course of her employment with respondent.

(3) As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.³

WHEREFORE, the Appeals Board affirms the Order for Compensation dated April 5, 2000, entered by Administrative Law Judge Brad E. Avery.

IT IS SO ORDERED.

Dated this ____ day of July 2000.

BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS
Wade A. Dorothy, Lenexa, KS
Mark E. Kolich, Kansas City, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director

³ K.S.A. 1999 Supp. 44-534a(a)(2).